

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the Gas Market Activities of Southern California Gas Company, San Diego Gas and Electric, Southwest Gas, Pacific Gas and Electric, and Southern California Edison and their impact on the Gas Price Spikes experienced at the California Border from March 2000 through May 2001.

Investigation 02-11-040
(Filed November 21, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION TO QUASH SUBPOENA**

Sempra Energy (Sempra) has moved to quash a subpoena duces tecum served by Southern California Edison (Edison). The subpoena, while issued on October 12, 2004, is referred to herein as the October 19, 2004, subpoena. The subpoena itself is in response to my earlier ruling quashing Edison's subpoena duces tecum of April 8, 2004, because the subpoena and supporting affidavit did not comply with Rule 60(b) of the Commissions' Rules of Practice and Procedure. (*See* ALJ Ruling Denying Motion to Compel Discovery (Oct. 4, 2004)). Specifically, I indicated that the affidavit must show good cause for the production of the documents, specify the documents to be produced, demonstrate their materiality, and state that the documents are in the possession or control of the subpoenaed witness.

With its subpoena of October 19, 2004, and accompanying affidavit of Walker A. Matthews, Edison seeks to cure the defects identified in the Administrative Law Judge (ALJ) ruling. In seeking to quash the subpoena, Sempra renews its argument that this most recent discovery request, in certain

respects, still fails to satisfy the good cause and materiality requirements of Rule 60(b). Sempra argues that Edison's supporting affidavit fails to demonstrate good cause or materiality because it states only "boilerplate conclusions." Additionally, Sempra argues that the subpoena will impose an unreasonable discovery burden as the request comes rather late in the proceedings and will require the company to search again for documents that have been previously produced.

In response to earlier discovery requests in this proceeding, Sempra has provided Edison with approximately 30,000 pages of documents. In response to inquiries from the California Attorney General (AG) and discovery requests by plaintiffs (Southern California Plaintiffs) in certain antitrust cases filed in San Diego County Superior Court (Nos. 4221, 4224, 4226, and 4228), concerning substantially the same alleged natural gas market abuses, Sempra has provided 120,000 pages of documents.

Efforts to Resolve Discovery Dispute

Upon questioning, counsel explained the efforts they undertook to resolve this discovery dispute prior to the filing of the motion to quash. Counsel appear to have made a good faith effort to resolve the dispute before the motion was filed. Such diligent efforts to resolve or narrow discovery disputes remain important to the law and motion ALJ and the ALJ assigned to this proceeding.

Good Cause Requirement

For each of its document requests, Edison adequately explains how the request relates to the issues specified in the Scoping Memo. *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355 (1961), while a pre-discovery act decision, has been used by subsequent courts for guidance in interpreting the good cause requirement of section 1985. *See Flora Crane Service, Inc. v. Superior Court*, 234 Cal. App. 2d 767, 791 (1st Dist. 1965). *Greyhound* indicates that good cause is that

“which must be shown . . . that will satisfy an impartial tribunal that the request may be granted without abuse of the inherent rights of the adversary. There is no requirement, or necessity, for a further showing.” 56 Cal. 2d at 388.

Enforcement of Edison’s subpoena, requiring Sempra to review documents already produced to the AG and Southern California Plaintiffs, will not abuse any inherent right of Sempra.

Specificity of Documents

Sempra complains that, except for a few requests, no new categories of documents are identified. Edison, however, has identified a set of documents (i.e., those previously produced to the AG or Southern California Plaintiffs) and asks whether any of those are responsive to any of Edison’s thirty-one questions. Edison’s request is sufficiently specific. Any duplication or burden requesting from this review is addressed below.

Materiality of Documents

While good cause and materiality are different inquiries, Edison’s affidavit demonstrates for each item how it potentially relates to issues being addressed in this proceeding.

Sempra argues that many of the questions (e.g., 3, 5, 7, 18, 20, 21, 22, 24, 26-29) ask for information that relates to Phase IA, recently completed, rather than Phase IB that is now underway. The Phase IB issues generally asks whether Southern California Gas Company’s or San Diego Gas & Electric Company’s affiliates or parent company, such as Sempra, played a role in causing border price increases. Thus, much of the existing discovery as well as discovery sought in the most recent subpoena may produce documents admissible in either phase. Also, on December 16, 2004, the Commission did not approve the Assigned ALJ’s proposed decision on Phase IA issues, and additional proceedings may be held in

that Phase. Accordingly, the requested discovery may be utilized for additional proceeding in that phase as well.

Location of Documents

Each request in the subpoena asks for documents that Sempra provided to the AG or Southern California Plaintiffs. Sempra has indicated that it has maintained this set of documents. No issue has been raised about the documents not being within Sempra's control or possession.

Other Issues

I, therefore, conclude that Edison's subpoena satisfies the requirements of Rule 60(b) and Code of Civil Procedure section 1985. I now turn to other issues raised by Sempra in its challenge: (a) whether the request is cumulative or unduly burdensome to Sempra; and (b) confidentiality concerns.

Sempra argues that many of the most-recent questions are cumulative and duplicative of requests made in the earlier subpoena. Why many questions are similarly worded, invariably they ask for something different than the earlier questions. While earlier questions may have asked for documents prepared by certain persons on a particular subject, the most recent question asks for all documents on that subject that were submitted to the AG or the antitrust plaintiffs. If Sempra were required to make a second reconnaissance of all of its corporate records, the request would be unduly burdensome. Sempra, however, is being asked only to search the discrete set of documents already submitted in response to the AG's requests and the antitrust plaintiff's interrogatories. This document set may be presumed to contain potentially admissible evidence since Sempra itself identified and submitted the documents in response to inquiries concerning gas market activities.

Sempra indicates that, to accurately respond to the subpoena, it still will have to review the 120,000 documents provided to the AG and antitrust plaintiffs to identify relevant documents and determine those responsive to the subpoena. The question is whether the search of this discrete set of documents is unduly burdensome. At oral argument, Sempra counsel indicated that this document set resides in 30 banker's boxes and it would take a knowledgeable attorney four to six hours to review each box. While this is a substantial undertaking, such review is comparable to the discovery burden in complex litigation. Edison has already reviewed an even larger set of documents to produce the 120,000 documents produced to the AG and antitrust plaintiffs. The discovery burden is also outweighed by the seriousness of the issues at the heart of this proceeding. Even though Sempra is not a party to this particular proceeding, it has the obligation to assure the Commission that earlier safeguards for preventing affiliate abuse among Sempra entities remain satisfied. (*See* ALJ Ruling on Motion Concerning Discovery Costs 5 (April 15, 2004)).

Finally, any of Sempra's confidentiality concerns have been addressed by the protective order previously entered in this proceeding.

Therefore, **IT IS RULED** that:

1. Sempra's motion to quash is denied.
2. Sempra shall respond to the document requests made in Edison's October 19, 2004, subpoena by reviewing the documents previously provided to the California Attorney General or the Southern California plaintiffs and providing Edison with copies of any documents responsive to those requests that have not previously been provided to Edison. Sempra need not answer Question 2 of the October 19th subpoena since it entirely duplicates Question 1.

3. Semptra shall complete its review of the documents and provide Edison with copies of any identified documents on or before Friday, January 28, 2005.

Dated December 17, 2004, at San Francisco, California.

/s/ JOHN E. THORSON

John E. Thorson
Law and Motion Judge
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion to Quash Subpoena on all parties of record in this proceeding or their attorneys of record.

Dated December 17, 2004, at San Francisco, California.

/s/ ERLINDA A. PULMANO
Erlinda A. Pulmano

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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